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## WHERE THE RUBBER MEETS THE ROAD: INJECTING MERCY INTO A SYSTEM OF JUSTICE

Jeanne Bishop\*

### I. INTRODUCTION

I am an assistant public defender in the largest unified court system in the world: Cook County, Illinois.<sup>1</sup> Our courtrooms are clogged with cases. Our prosecutors and public defenders are staggering under crushing caseloads. Our jail—ten divisions over ninety-six acres which houses approximately 10,000 inmates—is almost bursting.<sup>2</sup> Drug charges, or drug-related charges, comprise a large portion of our cases.

Most of my clients are incarcerated pretrial. I visit them in the Cook County Jail, where I am allowed to bring in only the essentials—my case file, a pen, and my IDs. Nevertheless, one day when I went to see a client in Division 5, I would have given anything to have a camera. I wanted to capture and show to the world what I saw—an image indelibly imprinted on my mind.

I caught a glimpse of it as I was heading toward the area where attorney visits take place. To get there, you have to walk past the general public's visiting room. The visiting room contains a long row of cubicles, separated by glass. On one side, clad in identical khaki scrubs, sat inmates; on the other side sat a row of people who had come to visit them. A small hole was fixed in the center of the glass at each cubicle, through which inmates and visitors could speak to one another. On the right side of the glass, about twenty-five young men in jail garb leaned toward the hole to speak. On the left side of the glass, clusters of women—wives, mothers, aunties, grandmothers, girlfriends—leaned

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<sup>1</sup> See generally R. Ben Brown, *Court System*, ENCYCLOPEDIA OF CHI., <http://www.encyclopedia.chicagohistory.org/pages/346.html> (last visited Jan. 14, 2013) (providing an overview of the Chicago court systems, including the Cook County courts).

<sup>2</sup> *Cook County Department of Corrections*, COOK COUNTY SHERIFF'S OFF., [http://www.cookcountysheriff.org/doc/doc\\_main.html](http://www.cookcountysheriff.org/doc/doc_main.html) (last visited Jan. 14, 2013). Cook County's department of corrections is one of the largest in the United States, holding approximately 100,000 detainees annually and about 9,000 detainees daily. *Id.*

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toward the hole to listen. Men and women straining toward one another, but unable to touch—it was a tableau of human yearning.

It was also profoundly disturbing. I thought to myself: *What's wrong with this picture?* It then instantly struck me: every one of those young men on the right side of the glass was black. Every single woman on the left side was, too.

This occurred to me later on when I left the visiting room and walked through the hallways of the jail. A crowd of inmates passed me in a corridor. They were coming from somewhere—lunch or recreation. Almost every face in that crowd was young and black.

I see this phenomenon in the lockup when I come to work at the courthouse. I have white, Latino, Asian, and a few female clients. The faces that look out at me through the glass doors of cells, though, are predominantly the faces of young black men. Ironically, young black men in Chicago also suffer disproportionately as victims of crimes. The headline in the *Chicago Tribune* says it all: “*Homicide Numbers Reveal Stark Contrast African-Americans Hardest Hit by Spike in Violence, Deaths in Chicago*.”<sup>3</sup> According to the *Tribune* article, 201 of the 259 homicide victims from the first half of 2011 were African-American.<sup>4</sup> “[B]lack men make up about 33 percent of the city’s population, [but] they accounted for nearly 78 percent of the homicide victims through the first six months of 2012. . . . [M]ales ages 15 to 35 made up nearly three-quarters of African-American homicide victims.”<sup>5</sup>

I understand that Cook County, Illinois, has a different demographic than many other places in the United States. But it is undeniable that, nationwide, we are losing a large portion of a generation of young black and Latino men to the criminal justice system.<sup>6</sup> This is, in part, because of the drug war.<sup>7</sup> The results have been calamitous for those young men, their families, the criminal justice system, taxpayers, and the nation.

<sup>3</sup> David Heinzmann, *Homicide Numbers Reveal Stark Contrast: African-Americans Hardest Hit by Spike in Violence, Deaths in Chicago*, CHI. TRIB., July 12, 2012, [http://articles.chicagotribune.com/2012-07-12/news/ct-met-chicago-homicide-demographics-20120712\\_1\\_homicide-victims-homicide-numbers-police-data.html](http://articles.chicagotribune.com/2012-07-12/news/ct-met-chicago-homicide-demographics-20120712_1_homicide-victims-homicide-numbers-police-data.html). See generally Russell L. Jones, *A More Perfect Nation: Ending Racial Profiling*, 41 VAL. U. L. REV. 621 (2006) (discussing how racial profiling has served to divide the American public).

<sup>4</sup> Heinzmann, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> See *id.* According to the *Chicago Tribune* article, there were 44 Hispanic victims, of which 27 of the victims were males ages 15 to 35. *Id.*

<sup>7</sup> See Tony Newman, *Connecting the Dots: 10 Disastrous Consequences of the Drug War*, HUFFINGTON POST (Jan. 3, 2013, 3:50 PM), [http://www.huffingtonpost.com/tony-newman/drug-war-consequences\\_b\\_2404347.html](http://www.huffingtonpost.com/tony-newman/drug-war-consequences_b_2404347.html) (discussing the negative impact of the drug war on communities, including unsafe neighborhoods, wasted taxpayer dollars, deteriorating public health, and destroyed families). “African Americans and Latinos together make up 29 percent of the total U.S. population, but more than 75 percent of drug

One problem with the drug war, in my experience, is that it takes away the flexibility of courts to do justice in a particular individual's case. Instead, the drug war imposes increasingly harsh mandatory sentences and sentence enhancements on people who could succeed with a less severe sentence and return to society as potentially productive citizens.<sup>8</sup> The judges and prosecutors I work with every day know these mandatory sentences are harsh. None of us like it. Here is my confession: sometimes we—defense attorneys, prosecutors, and judges—do everything we can to get around overly punitive mandatory sentences enacted by state legislators. We find a lesser charge to which the defendant can plead guilty. We agree that an enhancing factor should be removed from the charge, even when, in truth, it exists. We find ways to divert some cases out of the criminal justice system entirely.

This Article looks at the drug war, not from the perspective of academia or the capitols where laws are made, but from the perspective of the street: the workaday criminal courtrooms and the trial court judges' chambers where attorneys strike plea deals. It examines the way the people charged with applying the laws made to wage the drug war—prosecutors, defense lawyers, and judges—often find other, better ways to truly do justice in individual cases. We need to look closely at these harsh mandatory sentences because the young incarcerated men in Cook County are not numbers or part of an arithmetic formula. Each of the men dressed in khaki jail uniforms on the right side of the glass is a human being and a child of God.

Over-sentencing ignores that truth. It represents a failure, on multiple levels. It is a failure of our imagination: surely we can come up with more effective solutions to the problem of illegal drugs than to lock up an ever-increasing number of our citizens. Over-sentencing fails to

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law violators in state and federal prisons." *Id.*; see also Brian G. Gilmore & Reginald Dwayne Betts, *Deconstructing Carmona: The U.S. War on Drugs and Black Men as Non-Citizens*, 47 VAL. U. L. REV. 777 (2013) (noting that the increase in prison populations is a result of the war on drugs and that it has disproportionately affected African Americans); Michael M. O'Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. U. L. REV. 709 (2013) (discussing several theories that explain the large increase in incarceration rates nationwide, including the argument by Michelle Alexander that the war on drugs drives mass incarceration).

<sup>8</sup> See generally Jennifer M. Cox, Note, *Frequent Arrests, Harsh Sentencing, and the Disproportionate Impact They Have on African Americans and Their Community*, 3 S. REGIONAL BLACK L. STUDENTS ASS'N L.J. 17 (2009) (discussing the disproportionate and extreme, negative impact of harsh sentencing guidelines on African Americans and their communities); Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353 (2010) (examining how the incarceration of fathers negatively affects children and families, particularly African American families).

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conform to our deepest values about fairness, which requires that we treat each person as an individual and each case as a unique set of circumstances. Perhaps most importantly, over-sentencing fails to live out some of our most cherished beliefs about humanity: our capacity for change, our need—all of us—for second chances, and our potential for good.

American poet Robert Frost once wrote, “Nothing can make injustice just but mercy.”<sup>9</sup> Injecting mercy into a system of justice does more than just help to right the wrongs our overreliance on incarceration has wrought; it reflects our deepest values about the preciousness of every human life. Part II provides background information on how I started my career as a public defender.<sup>10</sup> Part III introduces the issue of over-sentencing in Cook County, and Part IV discusses current approaches to ameliorate over-sentencing.<sup>11</sup>

## II. BACKGROUND

Injecting mercy into a system of justice is not just a matter of professional commitment for me; it is a matter of love and faith. I started my law career as an associate at a big corporate law firm. I did corporate, municipal, and banking law. The hours were long; the pay was good. Yet, something was missing: any depth of meaning, any sense that my work was helping real people or making the world a better place.

Then horror struck—my younger sister Nancy Bishop Langert, her husband Richard, and their unborn baby were murdered in a Chicago suburb in 1990. Nancy was twenty-five years old and three months pregnant with what would have been their first child. Their killer was a sixteen-year-old neighbor who had broken into their house and waited for them to come home. When they did, the killer forced them into the basement at gunpoint. There, he shot Richard execution-style in the back of the head and Nancy in her pregnant belly. Nancy would not be silenced, though. While she lay dying beside her husband, Nancy wrote a message in her own blood: a heart shape and the letter “u” —Love you.

Nancy’s sudden and senseless death shocked me into action. If her life was taken away so young, I had to live in a way that wasn’t wasting

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<sup>9</sup> ROBERT FROST, A MASQUE OF MERCY 738 (1947), reprinted in JOHN H. TIMMERMAN, ROBERT FROST: THE ETHICS OF AMBIGUITY 90 (2002).

<sup>10</sup> See *infra* Part II (illustrating how my sister’s tragic death sparked my career as a public defender).

<sup>11</sup> See *infra* Part III (describing the over-sentencing problem in Cook County, specifically how bonds, prosecutors, police, judges, and penalties contribute to the problem); Part IV (exploring the current solutions in Illinois that divert offenders from jail).

one minute of the life that had been given to me. Within months of Nancy's murder, I left my job at the big law firm and became a public defender. I did that because of Nancy's message: love. The best way I could honor her memory and her message was to show love the way Jesus Christ, the author and perfecter of my faith, taught—by helping the poor and the prisoner.<sup>12</sup> If the way we treat the least among us—prisoners—is the same way we treat Jesus, then working to temper the harsh effects of the drug war with mercy is not just a matter of money, politics, or social policy; it is also a matter of faith.

### III. THE PROBLEM

How did society get to the point where, in some jurisdictions, we are spending more money on jails and prisons to incarcerate young people than on colleges and universities to educate them?<sup>13</sup> A look at my city, Chicago, can help answer that question. The drug trade in Chicago is vast.<sup>14</sup> In many areas of the city, drug dealers have a stranglehold on the neighborhood and the people trying to live there.<sup>15</sup> The people in those neighborhoods have been crying out for something to be done. Law-

<sup>12</sup> See *Mathew* 25:36 (New King James) ("I was naked and you clothed Me; I was sick and you visited Me; I was in prison and you came unto Me.").

<sup>13</sup> Aaron Sankin, *California Spending More on Prisons than Colleges, Report Says*, HUFFINGTON POST (Sept. 6, 2012, 8:47 PM), [http://www.huffingtonpost.com/2012/09/06/california-prisons-colleges\\_n\\_1863101.html](http://www.huffingtonpost.com/2012/09/06/california-prisons-colleges_n_1863101.html); see also Lisa Bloom, *When Will the U.S. Stop Mass Incarceration?*, CNN (July 3, 2012, 12:21 PM), <http://www.cnn.com/2012/07/03/opinion/bloom-prison-spending/index.html> ("Nationwide, spending on prisons has risen six times faster than spending on higher education."). See generally Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER, RACE & JUST. 315 (discussing incarceration growth from 1980–2009).

<sup>14</sup> *Zetas Drug Cartel in Chicago: 20 Charged in Drug Trafficking Network*, HUFFINGTON POST (Nov. 16, 2011, 9:51 PM), [http://www.huffingtonpost.com/2011/11/16/zetas-drug-cartel-in-chic\\_n\\_1098112.html](http://www.huffingtonpost.com/2011/11/16/zetas-drug-cartel-in-chic_n_1098112.html); see, e.g., *Thirty-Nine Alleged Associates of Two Chicago-Area Drug Trafficking Organizations Facing Federal Narcotics Charges*, FBI CHI. DIVISION (Sept. 28, 2012), <http://www.fbi.gov/chicago/press-releases/2012/thirty-nine-alleged-associates-of-two-chicago-area-drug-trafficking-organizations-facing-federal-narcotics-charges> (reporting on the arrest of two leaders of separate drug trafficking operations that led to the arrest of over one hundred people).

<sup>15</sup> Natalie Moore, *Drug Trade Fragments in Chicago Neighborhoods*, WBEZ 91.5 (June 9, 2010), <http://www.wbez.org/story/news/local/drug-trade-fragments-chicago-neighborhoods> (explaining that crimes from drug trades are destroying communities in Chicago); e.g., Chuck Goudie, *I-Team Report: The Avenger of 'K-Town'*, ABC NEWS CHI. (June 13, 2012), <http://abclocal.go.com/wls/story?section=news/iteam&id=8700491> (illustrating the lives of people in the drug-driven neighborhoods in the West side of Chicago); see also Alejandro Escalona, *Drug Cartels Bring Violence to Chicago Streets*, CHI. SUN-TIMES (Jan. 2, 2013, 4:14 PM), <http://www.suntimes.com/news/escalona/17345909-452/drug-cartels-bring-violence-to-chicago-streets.html> (noting the death of a six-year old in Chicago was the result of the proliferation of gang violence and illegal guns in Chicago neighborhoods).

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abiding citizens want their children to be able to walk to the park or to school without fear of going past gang-bangers selling drugs on the corner. Homeowners do not want their already tenuous property values to plummet further.

Cook County Circuit Court Judge William O'Brien describes his experience when he was Chief of the Narcotics Prosecution Bureau of the Cook County State's Attorneys' Office.<sup>16</sup> He would go out to neighborhood meetings and be the object of residents' ire. Young men were out selling drugs on the streets. O'Brien and his colleagues, mindful of the problem of mass incarceration of young black men, asked residents what they wanted to be done. The residents wanted the young men arrested and locked up.<sup>17</sup> Police response to the neighborhood outcry was to do exactly that.<sup>18</sup>

Legislators in the Illinois General Assembly enact the state's criminal laws, and they know that one of the best ways to respond to constituents' concerns about crime is to vote for "tough on crime" laws, regardless of the collateral consequences.<sup>19</sup> Democrats and Republicans alike have embraced this approach. State Senate Majority Leader John Cullerton once remarked to me that he had to remind his colleagues that the law permitted them to propose increasing penalties for a particular offense only *once* per term, and not more often.

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<sup>16</sup> Judge William T. O'Brien, COOK COUNTY JUDGES, <http://cookcountyjudges.com/judgeBios/obrienfull.html> (last visited Jan. 14, 2013). Judge O'Brien was Chief of the Narcotics Prosecution Bureau from 1998–2002. *Id.*

<sup>17</sup> Interview with Judge William O'Brien, Cook County Circuit Court Judge, in Chicago, IL (Aug. 2012).

<sup>18</sup> E.g., Penny Starr, *Chicago Police Round up 307 Suspected Drug Dealers in Three Days*, CNSNEWS (Aug. 27, 2012), <http://cnsnews.com/news/article/chicago-police-round-307-suspected-drug-dealers-three-days>.

<sup>19</sup> Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 244 (2012) ("Politicians, whether they are in the legislative or executive branch, face immense pressure to advocate for stiff criminal penalties."); Kimbriell Kelly, *We've Gotten Tough on Crime, But Are We Any Safer?*, CHI. NOW (Nov. 2, 2012, 12:40 PM), <http://www.chicagonow.com/chicago-muckrakers/2012/11/weve-gotten-tough-on-crime-but-are-we-any-safer/> (comparing the Finnish criminal justice system with Cook County's justice system); see, e.g., John Maki, *Illinois' Rendezvous with Prison Overcrowding*, CHI. SUN-TIMES (Mar. 1, 2012, 9:10 PM), <http://www.suntimes.com/news/otherviews/10983818-452/illinois-rendezvous-with-prison-overcrowding.html> (noting the increase in prison populations is partially the result of early release programs being suspended as a result of election-year politics). But see, e.g., Gov. Pat Quinn's Illinois Budget: Close Some Illinois Prisons, Invest More Money in Illinois Community Care, TASC BLOG (Feb. 23, 2013), <http://iltasc.wordpress.com/2012/02/23/gov-pat-quinn-s-illinois-budget-close-some-illinois-prisons-invest-more-money-in-illinois-community-care/> (discussing the possible 2013 Illinois budget that decreases reliance on prisons and increases the use and funding of transitional services and community-based care).

The people selling drugs on the street corner — mostly young men — seem unaware of or are simply undeterred by those increasing penalties. When I was assigned as a public defender to juvenile court, I asked my young clients why they sold drugs. The answer was invariably, “It’s the only way I know how to make money, and I need money. My mom is a crack-head, my dad is in jail. There is no money for things I need: shampoo, underwear, haircut, even food sometimes. I need to buy clothes.”

I can understand why the public may have little sympathy for those young offenders or anyone who sells illegal drugs. It is hard to argue that drug crimes are “victimless” when one considers the attendant damage. Drug sales and usage can devastate communities and breed violence from turf wars over sales territory.<sup>20</sup> It can also contribute to obesity, low school attendance, and high drop-out rates, because there is a fear that children will be shot if they go outside to play or walk to school.<sup>21</sup>

A makeshift memorial on the far south side of Chicago contains stones scrawled with the names of young people who have been

<sup>20</sup> See H.R.J. Res. 0109, 94th Gen. Assemb., Reg. Sess. (Ill. 2008) (noting that communities are the victims of the drug war because drug offenders cause crime in community areas); *Narcotics Prosecutions Bureau*, COOK COUNTY STATE’S ATT’Y’S OFF., <http://www.statesattorney.org/index2/narcoticsbureau.html> (last visited Feb. 23, 2013) (“Neighborhoods are plagued with drug dealers, increased street violence, and the scourge of gangs that support themselves with narcotics money.”).

<sup>21</sup> See generally ROSEANNA ANDER, PHILIP J. COOK, JENS LUDWIG & HAROLD POLLACK, *THE UNIV. OF CHI. CRIME LAB, GUN VIOLENCE AMONG SCHOOL-AGE YOUTH IN CHICAGO* (Mar. 2009), <http://crimelab.uchicago.edu/page/report> (describing the consequences of drug-related violence to families living in those communities). The Report interviewed families living in these devastated communities and describes how drug sales affect the ability for children to go to school:

We have to drive our kids everywhere. We can’t go to work full time because we worry about how are our kids gonna get to and from school? I mean how are they gonna go to the corner store? We can’t send one 15-year-old girl down to the corner store three houses down from ours because there are too many kids hanging around on the corner. There are grown men hanging on the corner. We know they’re packing. We know they’re selling. . . . The hardest part is that it’s an everyday struggle and it’s exhausting and it’s infuriating because when you want to build a successful future for your children. . . . It’s ongoing and it’s 365 days a year, 24 hours a day. It’s not like, “Oh, the summer’s here. It’s bad.” Yeah, it is bad in the summer, but it’s bad in the winter. It’s bad all the time. *The drugs don’t stop. The violence doesn’t stop. We’re tired.*

*Id.* at 4–5 (emphasis added) (quoting Chicago area parents who were interviewed).



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murdered—most of whom were shot to death.<sup>22</sup> The memorial has to keep expanding to accommodate the new stones added to the old.<sup>23</sup> The memorial sits across from a small, crumbling, weed-infested parking lot with freestanding basketball hoops at either end.<sup>24</sup> The neighborhood kids play basketball here, as one resident explained to me, because they are too street-smart to cross the invisible gang territory line to get to the big Chicago Park District park only a few blocks away. The basketball courts at that large well-groomed park often times are empty.

Something must be done to solve the problem of illegal drugs, but is the drug war that solution? One need only look at the overcrowded police lockups, courtrooms, and jail cells of Cook County, Illinois, to see that the drug war has not succeeded in reducing drug sales. Instead, it has resulted in the incarceration of more and more people.<sup>25</sup> There is no shortage of contributing causes to the increasing number of incarcerated individuals. Some of the causes that contribute to the growing number of incarcerations include bond amounts, prosecutors, police, judges, and penalties. Each of these causes is addressed in the following sections.<sup>26</sup>

#### A. Bond

Most of the people in the criminal justice system come from poverty. My office, the Office of the Cook County Public Defender, represents eighty-five percent of adults and ninety-five percent of juveniles facing

<sup>22</sup> *Chicago Memorial Represents 'A Generation Dying'*, CNN (Apr. 8, 2011, 3:24 PM), <http://www.cnn.com/2011/LIVING/04/08/cnnheroes.latiker.extra/index.html>.

<sup>23</sup> Jeremy Gerner, Carlos Sadovi & Dahleen Glanton, *Violence Grips Chicago's Roseland Neighborhood*, CHI. TRIB., July 7, 2011, [http://articles.chicagotribune.com/2011-07-07/news/ct-met-roseland-boy-shot-20110707\\_1\\_roseland-residents-violence-grips-murder-victims](http://articles.chicagotribune.com/2011-07-07/news/ct-met-roseland-boy-shot-20110707_1_roseland-residents-violence-grips-murder-victims) (illustrating the vast number of murdered Chicago youth who have been memorialized). Tylar Williams, 14, after seeing the memorial was quoted as saying, "I just hope my name doesn't end up on one of these." *Id.* As of January 7, 2013, the memorial has 376 stones with an additional 100 yet to be added. Diane Latiker, *One Woman's Quest to End Violence and Empower Youth in Chicago's Roseland*, THEWIP.NET (Jan. 7, 2013), [http://thewip.net/contributors/2013/01/one\\_womans\\_quest\\_to\\_end\\_violence.html](http://thewip.net/contributors/2013/01/one_womans_quest_to_end_violence.html).

<sup>24</sup> See Latiker, *supra* note 23 (describing the deterioration of the Roseland neighborhood).

<sup>25</sup> *Judge Orders Cook County to Fix Jail Overcrowding*, PR NEWswire, <http://www.prnewswire.com/news-releases/judge-orders-cook-county-to-fix-jail-overcrowding-59903162.html> (last visited Jan. 14, 2013) ("As a result of [electronic monitoring program] cutbacks, the number of overflow prisoners had climbed to more than 580 as of October 2007. County Officials now claim that more than 300 inmates are forced to sleep on floors."). Indiana has a similar problem. See Jessica M. Eaglin, *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 867 (2013) ("Indiana incarcerates at a rate of 442 persons per every 100,000, which is almost three times the rate of some of the surrounding states in the Midwest region and slightly above the national average rate of incarceration amongst the states.") (footnote omitted).

<sup>26</sup> See *infra* Part III.A-C (discussing the problems associated with bonds, prosecutors, police, and judges, as well as penalties).

criminal charges in Cook County courts.<sup>27</sup> Poor people have a hard time bonding out of jail.<sup>28</sup> Even in minor misdemeanor or low-level felony cases, such as straight possession, my clients simply do not have enough money to post the required ten percent bond minimum to get out of jail while their cases are pending.<sup>29</sup>

For people charged with more serious crimes, such as selling drugs near a school zone, the obstacles to bonding out are even higher.<sup>30</sup> Cases that do not qualify for probation can have astronomical bond amounts.<sup>31</sup> In making a determination on bond amounts, judges consider the probability of jail time.<sup>32</sup> Defendants who are likely to go to jail, if convicted, are considered to have an incentive to flee.<sup>33</sup> Both the higher incentive to flee and the likelihood of jail are reflected in a higher bond determination for people charged with more serious crimes.<sup>34</sup>

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<sup>27</sup> See *About Cook County*, COOK COUNTY GOV'T, ILL., [http://www.cookcountygov.com/portal/server.pt/community/government/226/about\\_cook\\_county/312](http://www.cookcountygov.com/portal/server.pt/community/government/226/about_cook_county/312) (last visited Feb. 23, 2013) (noting that Cook County suburban municipalities account for about 85% of the County's total square miles); *Divisions of the Public Defender's Office*, COOK COUNTY GOV'T, ILL., [http://www.cookcountygov.com/portal/server.pt/community/public\\_defender%2C\\_law\\_office\\_of/260/divisions\\_of\\_the\\_public\\_defender%27s\\_office/366](http://www.cookcountygov.com/portal/server.pt/community/public_defender%2C_law_office_of/260/divisions_of_the_public_defender%27s_office/366) (last visited Feb. 23, 2013) (noting that there is a division of the Public Defender's Office that specifically represents juveniles who have been transferred to the adult court).

<sup>28</sup> Aimee Mayer, *For the Poor, Bail Often Means Jail*, THE HUM. RIGHTS BRIEF (Mar. 11, 2011), <http://hrbrief.org/2011/03/for-the-poor-bail-often-means-jail/>. Mayer goes on to state:

After arrest, the accused who is poor must often await the disposition of his case in jail because of his inability to raise bail, while the accused who can afford bail is free to return to his family and job . . . . This is an example of justice denied, of a man imprisoned for no reason other than his poverty. . . .

*Id.* (quoting Goldberg, J.).

<sup>29</sup> See generally CHI. POLICE DEP'T., BAIL BOND MANUAL: GENERAL BONDING PROCEDURES 3 (2009), <http://directives.chicagopolice.org/forms/CPD-11.909.pdf> (discussing the types of offenses that warrant a bond payment of 10% of the total amount).

<sup>30</sup> See *id.* (providing the various bond amounts as they relate to the offense).

<sup>31</sup> See *id.* at 2 (noting that the judge sets the bail for felony arrests).

<sup>32</sup> *Id.*

<sup>33</sup> See Alex Tabarrok, *The Bounty Hunter's Pursuit of Justice*, WILSON Q., Winter 2011, at 56, 56–57, available at <http://www.wilsonquarterly.com/article.cfm?AID=1775> (explaining that the purpose of bond is to ensure that a defendant will appear in court); Mayer, *supra* note 28 (noting that bail requirements provide an incentive for a defendant to attend scheduled court appearances).

<sup>34</sup> See Mayer, *supra* note 28 (“The amount of bail should be no more than is reasonably needed to keep the suspect from fleeing before or during the case.”).

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*B. Prosecutors, Police, and Judges*

Often the policies of the prosecutors' office make it difficult to lower a charge to one that carries a reasonable sentence. For example, in Cook County's specialized drug courts, the state's attorney has a policy of not reducing any charge of selling controlled substances if the buyer is an undercover police officer. Likewise, police officers often wait to arrest people suspected of drug offenses until they have accumulated a number of offenses. The statute of limitations for prosecutors to bring charges on felony offenses is three years from the date of the offense.<sup>35</sup> If the State waits long enough to charge a suspect, the suspect has little chance of establishing an alibi or any other defense because he cannot remember what he was doing or whom he was with.<sup>36</sup> Even if he does remember, that witness may be unavailable, dead, moved away, or unable to be found.

Most drug cases involve police rather than civilian witnesses. While many judges routinely discredit civilian witnesses, judges typically are hesitant to find police officers not credible. Some judges are altogether unwilling to find that the police are lying. Penalties also contribute to over-sentencing.

*C. The Penalties Problem*

In Illinois, drug offenders, even ones with no history of violence, can receive prison sentences that shock the conscience. Habitual criminals convicted of three Class X drug charges can be sent to prison for the rest of his or her natural life.<sup>37</sup> These individuals will spend a lifetime behind bars, just for selling drugs. Once a drug defendant accumulates two Class 2 or higher felony convictions (for example, burglary and

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<sup>35</sup> 720 ILL. COMP. STAT. 5/3-5(b) (2011); *People v. Berg*, 660 N.E.2d 1003, 1004 (Ill. App. Ct. 1996) (quoting 720 ILL. COMP. STAT. 5/3-5(b)). The court noted that the statute of limitations serves a distinct purpose:

The purpose of a statute of limitations is to protect individuals from stale prosecutions by having to defend themselves against criminal charges when the basic facts have become obscured by the passage of time, to minimize the danger of punishment for conduct in the far-distant past, and to encourage law enforcement officials to investigate suspected criminal conduct promptly.

*Id.* at 1005 (citing *People v. Strait*, 381 N.E.2d 692 (Ill. 1978)).

<sup>36</sup> *Berg*, 660 N.E.2d at 1005.

<sup>37</sup> See *People v. Glover*, 527 N.E.2d 968, 972 (Ill. App. Ct. 1988) ("Under the Illinois statute the defendant must be sentenced to life imprisonment if he has committed three Class X felonies, and Class X felonies involve the use of force or threat of force."); see also 720 ILL. COMP. STAT. 570/401(a) (2013) (providing a statutory definition and the requisite penalty for Class X felonies based on the type of drug and the amount).

possession of a stolen car), he is ineligible for probation.<sup>38</sup> For a Class X felony, the minimum sentence is six years in prison, while the maximum is thirty.<sup>39</sup> Because the sentencing range is so broad, even innocent defendants often choose to plead guilty to receive time near the bottom of the sentencing range. This ensures that the defendant avoids trial and a potential conviction, which would expose the defendant to sentencing time at the top of that range.

Sentencing ranges can depend on the weight and type of drug, ranging from sentences that are a minimum of six years and a maximum of sixty years in prison.<sup>40</sup> Drug-selling by two or more people in furtherance of the activities of a gang is punishable by ten to thirty years in prison and no probation.<sup>41</sup> Someone who organizes or supervises the drug-selling for the gang can get fifteen to sixty years.<sup>42</sup> Furthermore, any person eighteen years or older who sells drugs to someone under eighteen may be sentenced to imprisonment for a term up to *twice* the ordinary term for drug sales.<sup>43</sup>

The area where the drugs are sold can also influence the potential sentencing range for a defendant. Selling drugs within 1,000 feet of a school, church, park, or other location of public interest can convert a potential sentence of probation or a moderate amount of prison time to a non-probationable offense and a minimum of six years in prison.<sup>44</sup> While there are a variety of factors associated with the over-sentencing problem, potential solutions exist.

#### IV. SOLUTIONS

In Cook County, Illinois, mechanisms exist that are designed to reduce the number of people being incarcerated on drug charges. Those mechanisms can be both official and unofficial. Some official diversions used by Cook County include peer juries, drug and alcohol awareness classes, and special diversionary sentences. Unofficial diversions include not calling lab personnel as witnesses, dismissals, try-downs, judges, and amending the charges.

<sup>38</sup> 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2009).

<sup>39</sup> 730 ILL. COMP. STAT. 5/5-4.5-25(a) (2012). *See generally* Robert S. Hunter, Mark A. Schuering & Joshua L. Jones, *The Sentences for Class X Felonies*, in TRIAL HANDBOOK FOR ILLINOIS LAWYERS § 55:1 (9th ed. 2012) (discussing different sentencing options associated with Class X felonies).

<sup>40</sup> *See* 720 ILL. COMP. STAT. 570/401 (describing the range of sentencing available for controlled substance violations).

<sup>41</sup> 720 ILL. COMP. STAT. 570/405.2(a) (2005).

<sup>42</sup> *Id.* at 507/405.2(a)(iv).

<sup>43</sup> 720 ILL. COMP. STAT. 570/407(a)(1)(A) (2005).

<sup>44</sup> *Id.* at 570/407(b).

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A. *Official Diversions*

Official diversions are typically programs employed locally to divert certain drug crimes out of the criminal court.<sup>45</sup> These diversions provide opportunities to keep certain defendants out of prison. While the following mechanisms provide an alternative to issues associated with over-sentencing, these solutions have their own problems.

1. *Peer Juries*

In some jurisdictions—such as New Trier Township, Illinois, located on Chicago’s north shore—certain drug crimes never go to criminal court at all. Instead, they are referred to peer juries overseen by the township. Defendants under the age of seventeen, with some exceptions, are judged by peers and given a “consequence” as punishment.<sup>46</sup>

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<sup>45</sup> See 21 AM. JUR. 2D *Criminal Law* § 866 (explaining the diversionary process). “Procedures have been established in some jurisdictions in which the prosecution of a person accused of an offense is deferred, held in abeyance, or otherwise diverted from normal channels pending completion by the accused of one or more conditions as an alternative to prosecution.” *Id.* If the accused successfully completes the diversionary program, then the prosecution will dismiss the charges, and it is as if the charges were never filed. *Id.*

<sup>46</sup> *Peer Jury Program: Information Packet for Prospective Jurors and Parents/Guardian of Prospective Jurors*, NEW TRIER TOWNSHIP 2, <http://www.newtriertownship.com/assets/1/Documents/PeerJuryInformationPacket.pdf> [hereinafter *Info Packet for Jurors*]; see John P. Huston, *Peer Jury Helps Teens Avoid Criminal Record*, CHI. TRIB., Nov. 13, 2012, [http://articles.chicagotribune.com/2012-11-13/news/ct-tl-peer-jury-20121112\\_1\\_peer-jury-juvenile-offenders-juvenile-court](http://articles.chicagotribune.com/2012-11-13/news/ct-tl-peer-jury-20121112_1_peer-jury-juvenile-offenders-juvenile-court) (reporting on New Trier Township’s implemented Peer Jury program); *Peer Jury Program*, NEW TRIER TOWNSHIP, [http://www.newtriertownship.com/services/peer\\_jury\\_program.aspx](http://www.newtriertownship.com/services/peer_jury_program.aspx) (last visited Feb. 23, 2013) (explaining the process for an offender in the Peer Jury Program). In 1998, New Trier initiated the program to handle juvenile offenders with the cooperation of the police departments from Glencoe, Northfield, Kenilworth, Wilmette, and Winnetka. *Id.* The program diverts juvenile offenders from the court, avoiding a court appearance, which costs time and money. *Id.* To qualify for the program, the following must occur: “(1) the offender admits having committed the offense; (2) the responsible police officer [must determine] that such a disposition is appropriate; and (3) the offender and his/her parent or guardian consent in writing to such a disposition and sign a Waiver of Liability and Confidentiality.” *Info Packet for Jurors*, *supra*. Instead, selected juvenile offenders are referred to a panel of local high school students. *Peer Jury Program*, *supra*. Freeport, Illinois, also has a program where a jury of local teenagers recommends punishment for first time offenders. Travis Morse, *Local Peer Jury Program Gives Young Offenders a Second Chance*, JOURNALSTANDARD.COM (Oct. 18, 2011, 7:15 PM), <http://www.journalstandard.com/topstories/x984142103/Local-Peer-Jury-program-gives-young-offenders-a-second-chance>. In Freeport, Illinois, only certain offenses qualify for the peer jury program, including “battery, assault, retail theft, theft (\$300 and under), possession of cannabis, possession of drug paraphernalia, vandalism, and domestic battery.” *Id.*

Consequences include community service, a written paper, or simply an apology.<sup>47</sup>

Such peer juries, however, do not exist everywhere. This possibility of diversion from the criminal justice system, therefore, is available to some and not to others who have committed the very same offenses.

## 2. Drug and Alcohol Awareness Classes

The State offers to drop felony and misdemeanor drug charges for first-time offenders who complete a series of classes and community service. These classes are subject to certain conditions, including the amount of drugs involved in the offense and whether the offense is for possession versus intent to sell.<sup>48</sup> The program is not available to violent offenders.<sup>49</sup> Unfortunately, this program is constantly threatened with elimination because of budget cuts in the cash-strapped county government.

## 3. Special Diversionary Sentences

Some drug charges are eligible for supervision or a special type of probation, both of which can be expunged at the successful completion of the supervision or probation.<sup>50</sup> Supervised probation allows offenders to reside in the community while they are required to follow specific

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<sup>47</sup> *Peer Jury Program*, *supra* note 46 (describing an appropriate sentence as usually being “a number of hours of community service and sometimes a written paper or an apology”); *see, e.g., Morse*, *supra* note 46 (describing available punishment in the Freeport peer jury program, including “community service, peer counseling, jail tours, writing a research paper, and others”).

<sup>48</sup> *See Cook County Drug Court Treatment*, COOK COUNTY CT., <http://www.cookcountycourt.org/aboutthecourt/countydepartment/criminaldivision/specialtycourts/drugcourttreatmentprogram.aspx> (last visited Jan. 23, 2013) (discussing the drug treatment alternative for non-violent offenders).

<sup>49</sup> *Id.*

<sup>50</sup> *See* 20 ILL. COMP. STAT. 301/40-5 (2013) (discussing the general circumstances where the court will recommend an offender participate in a designated program as part of her probation sentence); 730 ILL. COMP. STAT. 5/5-6-3.1(f) (2013) (noting that discharge and dismissal after supervision does not count as a conviction); *see also* *People v. McGregor*, 939 N.E.2d 1009, 1011 (Ill. App. Ct. 2010) (explaining that the purpose of the Alcoholism and Other Drug Dependency Act is to encourage treatment and rehabilitation instead of traditional sentencing, so that the offender may effectively reintegrate into society (citing *People v. Brown*, 641 N.E.2d 948 (Ill. 1994))). *See generally* Donna K. Axel & David M. Rosen, *Putting Two Drug Courts to the Top Ten Test: Comparing Essex and Denver Drug Courts with “The Carey Team’s” Best Practices*, 47 VAL. U. L. REV. 839 (2013) (detailing the evolution of drug courts in the United States); Kimberly Y.W. Holst, *A Good Score?: Examining Twenty Years of Drug Courts in the United States and Abroad*, 45 VAL. U. L. REV. 73 (2010) (comparing the United States’s drug courts with others around the world).

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conditions.<sup>51</sup> Programs like the Treatment Alternatives for Safe Communities ("TASC") provide a special type of probation that treats the offender for drug addiction.<sup>52</sup> TASC coordinates a treatment program to change the offender's drug behavior, and, after completing the program, offenders eventually will have the record of the charge expunged.<sup>53</sup> These diversionary state court sentences, however, can have federal consequences.<sup>54</sup> The collateral consequences on things such as employment and housing can also be burdensome and severe for the offenders.<sup>55</sup>

### B. Unofficial Diversions

Like official diversions, prosecutors, public defenders, and judges also use unofficial diversions to reduce the number of drug convictions. Unofficial diversions can include failing to call certain witnesses; dismissals, try downs, and judges; and amending the charges.

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<sup>51</sup> 730 ILL. COMP. STAT. 5/5-6-1 (2013). The Illinois legislature requires the following conditions to enter an order for supervision:

- (1) the offender is not likely to commit further crimes;
- (2) the defendant and the public would be best served if the defendant were not to receive a criminal record; and
- (3) in the best interests of justice an order of supervision is more appropriate than a sentence otherwise permitted . . . .

*Id.* at 5/5-6-1(c)(1)–(3).

<sup>52</sup> See *About TASC, Inc.*, TASC, <http://www.tasc-il.org/preview/abouttasc.html> (last visited Feb. 15, 2013). TASC participants are usually referred by the court, but an offender will likely not be found eligible if: (1) it is a crime of violence; (2) the offender has been previously convicted of a non-probationable crime or felony; (3) the offender has a record of two or more violent crime convictions; (4) the pending offense is a felony; (5) the probation authority does not consent to this type of program; (6) the offender "elected and was admitted to a designated program on 2 prior occasions within any consecutive 2-year period;" (7) the offender "has been convicted of residential burglary and has a record of one or more felony convictions;" (8) the crime violates the Illinois Vehicle Code or a similar local ordinance; or (9) the crime is a reckless homicide of a person or an unborn child. 20 ILL. COMP. STAT. 301/40-5.

<sup>53</sup> 730 ILL. COMP. STAT. 5/5-6-2(d) (2009).

<sup>54</sup> James A. Shapiro, *Criminal Law Practitioners Beware: That Supposed "Non-Conviction" of Supervision*, IICLE, <https://www.iicle.com/articles/Article.aspx?ID=39> (last visited Feb. 28, 2013). According to Judge Shapiro, Illinois supervision diversionary tactics are considered a conviction unless they contain no "finding of guilt" under the Federal Sentencing Guidelines. *Id.*

<sup>55</sup> See generally Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011) (arguing that many jurisdictions lack an effective relief mechanism that will allow offenders to reenter society). Love explains that offenders with a criminal record are often isolated from participating in society because they are excluded from employment and housing opportunities. *Id.* at 774.

## 1. Not Calling Lab Personnel as Witnesses

The State bears the burden in drug cases, as in all cases, to prove every element of the crime beyond a reasonable doubt. On misdemeanor possession of cannabis charges, the State will rarely call a lab technician to come into court as a witness because lab technicians at the Illinois State Police Crime Lab are busy and in short supply. Without the lab techs, the State cannot bear its burden of proving that the substance recovered from the defendant was actually illegal cannabis. The charge is then dismissed, or the defendant wins at trial on a motion for a directed finding.

## 2. Dismissals, “Try-Downs,” and Judges

In particular circumstances, the State will dismiss drug charges for a repeat offender. One such circumstance is when a defendant is on probation for a drug charge and is arrested for a new drug charge. In such cases the State will frequently drop the new charge and proceed on the violation of the defendant’s probation. Typically, judges have greater discretion in sentencing for probation violations as opposed to new drug charges.<sup>56</sup>

Other situations warrant both parties attempting to “try down” the charges against a defendant. For example, parties often try down a defendant’s charges when a defendant is charged with possession of drugs with intent to deliver rather than a straight possession charge, which carries a much lower penalty. In such a case, both sides stipulate to a considerable amount of the evidence—the recovery of drugs, the fact that the substance recovered was in fact illegal drugs—and carry out a contested trial only on the issue of whether the defendant intended to sell the drugs in his possession, instead of merely possessing them.

Some judges view cases involving a very small amount of drugs as a waste of the court system’s limited resources. In the preliminary hearing courtrooms, these judges will routinely throw out any case involving drugs whose weight is less than one gram. Ultimately, the judge will rule that there is a finding of no probable cause, so no conviction and subsequent sentencing occur.

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<sup>56</sup> See generally Gregory J. O’Meara, *The Name Is the Same, but the Facts Have Been Changed to Protect the Attorneys: Strickland, Judicial Discretion, and Appellate Decision-Making*, 42 VAL. U. L. REV. 687, 707 (2008) (explaining how judicial discretion in the criminal world is a “mixed blessing”).



## 3. The Charges

Often the best hope my clients have of minimizing the time they might serve on a drug offense is for the State to agree to amend the charges. Prosecutors can do this in a number of ways.<sup>57</sup> One approach is to reduce the charges by dropping a higher class offense—usually the first count against my client—and get her to plead guilty to a lower class offense—usually one of the subsequent charges against her. The State can lower the amount of the drugs to something less than the actual weight or remove an enhancing factor, such as deleting the element that a drug sale was within 1,000 feet of a church or school. Another option available to the State is to amend the charge to a simple attempt, which lowers the offense and sentencing range by one class. Finally, the State can drop the charge and replace it with a completely new, uncharged offense.

Negotiating these changes often takes place around a table in a room behind the courtroom, in the judge's chambers, or in a conference room where three people sit—me, as the public defender, the prosecutor, and the judge. The prosecutor and the judge in these negotiations are almost unfailingly people whose judgment I admire and on whom I rely to do justice, because they care about fairness and are experienced enough to know the worth of a case.

Prosecutors and judges know that sentences mandated by the legislature can be too severe, not just for first-time offenders but also for repeat offenders.<sup>58</sup> I once represented a client who was caught with a small amount of cocaine in his sock. If the sentence guidelines were strictly followed, this client would have been given a mandatory natural life sentence if convicted of the class of offense with which he was charged. Everyone around the table—the prosecutor, the judge, and I—knew that such a result would be shockingly disproportionate to the gravity of the offense. We negotiated a plea on a drastically reduced charge for substantially less prison time.

The talk around the table, among us three, usually ends up with someone saying, “What are we going to do with this guy?” The

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<sup>57</sup> See Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 626 (2005) (“Though they may not have the same ability post-*Booker* to leverage mandatory Sentencing Guidelines, prosecutors retain the power to guide investigations, accept or decline cases, draft charges, press for convictions through plea negotiation, and seek specific sentences.”) (footnote omitted).

<sup>58</sup> See, e.g., Lynn Adelman, *The Adverse Impact of Truth-in-Sentencing on Wisconsin's Efforts to Deal with Low-Level Drug Offenders*, 47 VAL. U. L. REV. 689 (2013) (demonstrating a U.S. federal district court judge's frustration with the Wisconsin truth-in-sentencing law).

conversation then inevitably revolves around the individual characteristics of “this guy.” In our conversations, we often consider his upbringing, family, mental health, drug addiction, and gang involvement. We also look at his work history and criminal history.

When discussing the offender’s upbringing, the question becomes, “Did he have a chance or not?” Whether the offender grew up in a privileged or impoverished environment matters. For example, one client of mine was raised in a once-notorious Chicago public housing project, Cabrini Green. During one of our interviews in the lockup, he lifted his prison-issued shirt to reveal huge crevices in his arm and across his stomach. I asked what had caused it; he told me that as a baby he had been eaten by rats.

An offender’s family history is another characteristic we discuss in our plea conferences. A history of dysfunction or abuse can influence these negotiations. Another defendant I represented was reluctant to talk about his childhood. Over time the reason became apparent—his foster father had raped him every day for five years, purportedly as a punishment for acting up or performing badly in school.

A variety of other factors help us understand a drug offender and determine the appropriate plea. We look at the prevalence of mental illness. We determine whether the defendant, for example, is an untreated schizophrenic who is self-medicating with drugs. We examine whether the defendant struggled with addiction and the efforts the defendant has made to seek and undergo treatment. We also consider the success the defendant has had with treatment. Gang involvement can affect our plea negotiations—is he or she part of a gang which would make him or her more likely to reoffend in the future?

Work history and criminal history are additional factors in plea negotiations. We consider whether the accused tried to do something with his life, supported himself and his dependents, was a contributing member of society, or had a family dependent on the earnings of his job. When looking at a defendant’s criminal history, we examine whether he committed other types of crimes, especially crimes of violence, or whether his entire criminal history consists of drug cases.

I always wish legislators could see this process. I believe it works because it is closer to the truth and is *fairer* than mandatory sentences. The process of our individual examinations is the opposite of those mandatory sentences. Rather than treating everyone alike, individual examinations treat every person and every case as unique. That is the truth—each person is unique. Each case is, too. When the criminal justice system fails to recognize the unique circumstances of each case, we overlook the human potential of some of the individual offenders.

## V. THE WASTE IN THE DRUG WAR

Mandatory sentencing, in some circumstances, has been struck down at the federal level as unfair. In the U.S. Supreme Court case *Miller v. Alabama*, the Court struck down mandatory life sentences for juvenile offenders as cruel and unusual, because those sentences failed to take into account an important factor—the youth of the offender.<sup>59</sup> The mandatory drug sentences my clients face fail to consider a whole host of factors, which could mitigate their offense. Meanwhile, more and more people are shoved onto the conveyor belt from the streets to prison.

The waste of material resources in this process is well-documented.<sup>60</sup> In Illinois, we are in a crisis because our budget is so imbalanced.<sup>61</sup> The waste of human potential cannot be quantified, but it is no less a crisis. I saw that wasted human potential the other day when I went to see a client in the jail whom I will call Anthony.<sup>62</sup> Anthony was charged with a non-probationable felony that could have sent him to prison for six to thirty years if convicted. His case was set for trial. I went to discuss it with him. When he entered the visiting room, I launched in, ready to go over the evidence with him. “Let me talk!” he shouted. “I never get to talk!” Surprised, I invited him to talk as long as he liked; I would sit and listen. He spoke non-stop for an hour and a half.

At first, he spoke about the facts of the case. Then his story broadened and deepened. He talked about the past. What it was like to grow up neglected. Why he joined a gang when he was a young teenager, looking for a sense of belonging and respect. What a mistake that was, which he admitted he now realized. Why he blindly followed orders and did things he would never do now.

He talked about the present. His neighborhood, filled with people he didn’t want to be like. One of the men in his neighborhood bragged about having children but supported none of them; others stumbled around high all day. Anthony wanted to do better.

He talked about the future—he had only one child, a son, Anthony, Jr., and he wanted to provide for his son. That, he admitted, was why he sold drugs. He wanted to earn money. He wanted his son to go to

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<sup>59</sup> 132 S. Ct. 2455 (2012).

<sup>60</sup> See, e.g., *supra* Part III (discussing the over-sentencing problem and its effects in Illinois).

<sup>61</sup> See generally ILL. REPORT, STATE BUDGET CRISIS TASK FORCE (Oct. 2012), <http://www.statebudgetcrisis.org/wp-content/images/2012-10-12-Illinois-Report-Final-2.pdf> (discussing the current fiscal problems in Illinois and potential recommendations to improve the budget).

<sup>62</sup> Anthony is not my client’s real name but simply a name used to describe my client’s situation.

Yale or Harvard, to be a doctor, lawyer, scientist, or teacher. He wanted a house of his own and a mortgage. He wanted to buy a home for his mother, so she wouldn't have to live in an apartment anymore, where she paid rent to someone who could kick her out at any time. When he was in prison before, he had taken some classes, received college credits, and learned a trade. If he went to prison again, he said that he wanted to take more classes so he could possibly get a degree and acquire a skill that would allow him to earn a living once he got out.

What struck me as he spoke was the sheer human potential of this man, wasted. The future he dreamed of for himself and his son seemed as unlikely as his boarding a rocket ship to the moon, considering the minimum six-year sentence in prison he would have to serve if convicted. The human potential of Anthony, his son, and every defendant and his or her children invokes our most deeply held beliefs—the intrinsic value of each human being, our importance in the eyes of God.

Mark Osler, a law professor at University of St. Thomas School of Law and also a contributor to this volume, expresses this powerfully in his book, *Jesus on Death Row: The Trial of Jesus and American Capital Punishment*:

In Matthew 25, Jesus talked of those who fail to help those who are naked or sick or in prison. In talking about those in prison, he said to his followers, “Truly I tell you, just as you did not do it to one of the least of these, you did not do it to me” (Matt 25:45). To some, the “least of these” means poor people, and I would agree. It also means the convicted criminal in prison, to whom Christ specifically referred. . . .

Thus, I have no problem with equating the hated, the guilty, even the imprisoned and reviled killer with Christ, for it is at Christ's invitation that I compare my society's treatment of “the least of these” with that of Christ himself.<sup>63</sup>

If the laws under which we are charging, convicting, and sentencing drug offenders are weapons of the war on drugs, then the people I represent every day can be called casualties of that war. Likewise, their

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<sup>63</sup> MARK WILLIAM OSLER, *JESUS ON DEATH ROW: THE TRIAL OF JESUS AND AMERICAN CAPITAL PUNISHMENT* 6 (2009); see also Mark Osler, *Amoral Numbers and Narcotics Sentencing*, 47 VAL. U. L. REV. 755, 755 (2013) (discussing how arbitrary sentencing guidelines have created tragic outcomes in society).

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families and their scarred neighborhoods can be called collateral damage of that war. But those offenders, those families, and the people who live in those neighborhoods are children of God. They cannot simply be a body count.

VI. CONCLUSION

I return to the question that flashed through my mind when I walked by the visiting room teeming with young black men on one side of the glass at Cook County Jail: *What's wrong with this picture?* The problem is that that room is too crowded. It is too much a part of our routine, our normal. It is filled with people mostly of the same gender, age, and race. It is the evidence and emblem of over-sentencing in drug and drug-related cases.

Over-sentencing occurs, in part, because the laws fail to take into account the individual characteristics of each defendant and the individual facts of each case. Prosecutors, judges, and defense attorneys who work in the criminal courts in this country do not make the laws. Yet, we are charged with applying them. Sometimes that means doing all we can to find a way around those laws. We try to administer justice one case at a time, which only seems fitting. Astronomer Carl Sagan declared each human being to be precious: "In a hundred billion galaxies you will not find another."<sup>64</sup> The role of mercy in a system of justice is nothing less than to see the worth of each person, recognizing in every man and woman the very image of God.

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<sup>64</sup> Carl Sagan Quotes, EIRCOM.NET, [http://homepage.eircom.net/~odyssey/Quotes/Life/Science/Carl\\_Sagan.html](http://homepage.eircom.net/~odyssey/Quotes/Life/Science/Carl_Sagan.html) (last visited Jan. 23, 2012).